MUHAMMAD RIDOAN & ANOR A

v.

PP

HIGH COURT MALAYA, SHAH ALAM B
ABDUL RAHMAN SEBLI J
[CRIMINAL APPEALS NO: 42H-274 & 276-09-2011]
16 NOVEMBER 2012

CRIMINAL PROCEDURE: *Sentence - Principles of - Appellants charged with armed robbery - Penal Code, ss. 395 & 397 - Victim's house broken into - Whether offence punishable under s. 453 of Penal Code - Public interest - Deterrent sentence - Whether whipping an effective deterrent - Whether sentences enhanced - Criminal Procedure Code, ss. 316(b)(ii), 325* C D

The appellants, both Indonesian nationals, were charged in the Sessions Court with armed gang robbery, an offence under ss. 395 and 397 of the Penal Code. On 27 July 2012, at about 3am, according to the victim, male intruders had broken into his house while he and his family were asleep, smashed open the bedroom door, pointed a knife at the victim's neck and had tied the victim and his family up with wires before robbing them of their belongings. The intruders then left the victim's house with a laptop, three handphones and about RM1,100 in cash. While two had been arrested and were the appellants in the present appeal, the other two intruders remained at large. The appellants pleaded guilty to the charge and were sentenced to seven years imprisonment and seven strokes of the *rotan* each. Dissatisfied, the appellants appealed for the sentence to be reduced, on the grounds that (i) they had pleaded guilty to the charge; and (ii) they were remorseful and promised not to commit the same offence in the future. E F G

Held (striking out appeals against sentence; enhancing sentence against both appellants): H

(1) How the crime was committed and how the appellants and their accomplices conducted themselves at the time of committing the offence were important considerations in passing sentence. The learned judge should have properly and adequately directed his mind to the victim's police report I

A which showed that although the appellants were charged with the crime of armed gang robbery, they had, in carrying out the robbery, broken into the victim's house, which was an offence by itself punishable under s. 453 of the Penal Code. (para 5)

B **(2)** Although a plea of guilty is a mitigating factor, it should not be given too much consideration in cases of armed gang robbery by breaking into other people's homes. The same went with having no record of previous conviction. The rampancy of the offence, the trauma caused to the victims and the C negative impact this type of criminal activity has on society demands that the punishment must be stiff enough to deter others from committing the same offence. (para 8)

(3) The appellants were aliens and the arrest report showed that when they were cornered by the police at their 'kongsi' in the D early hours of 28 July 2012, the day after the robbery, they had tried to run away and had a scuffle with the police. It was obvious that they had no desire to take responsibility for what they had done. Had it not been for the efficiency and quick action of the police, they would have escaped E punishment altogether and lived another day to break into another family's house of their choice. As a matter of fact, their two accomplices were still at large. (para 12)

(4) The public must be protected from these dangerous F individuals. One way is for the courts to pass sufficiently deterrent sentences so as to strike fear in the minds of those who harbour thoughts of committing the same offence. The deterrent factor must weigh heavily in the minds of the sentencing courts. Whipping is an effective deterrent and the G number of strokes must be sufficient to deter those who think they can profit from traumatising other people in the safety of their homes. (para 16)

(5) The sentence herein was not deterrent enough and did not H sufficiently reflect the degree of public abhorrence for this type of criminal behaviour. In the circumstances and in exercise of the court's powers of revision under s. 325 read with s. 316(b)(ii) of the Criminal Procedure Code, the sentence against both appellants were ordered to be enhanced to ten I years imprisonment and ten strokes of the *rotan*. (para 17)

Case(s) referred to:
Mohamed Jusoh Abdullah & Anor v. PP [1947] 1 LNS 66 HC ***(refd)***
PP v. Lee Tak Keong [1988] 1 LNS 217 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Nazarudin Ahmad & Ors [1993] 2 CLJ 543 HC ***(refd)***
PP v. Shahrul Azuwan Adanan & Anor [2013] 2 CLJ 686 HC ***(refd)***
PP v. Teh Ah Cheng [1976] 1 LNS 116 HC ***(refd)***
R v. Ball [1951] 35 Cr App R 164 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Teo Siew Peng & Ors v. PP [1984] 1 LNS 71 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 316(b)(ii), 325,
Penal Code, ss. 34, 395, 453

For the appellants - In person
For the prosecution - Mohd Fuad Abdul Aziz; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

[1] The two appellants, both Indonesian nationals, were charged in the Sessions Court at Kajang with armed gang robbery and the charge against them is as follows:

> Bahawa kamu bersama-sama 2 orang yang masih bebas, pada 27/07/12 jam lebih kurang 0330 hrs, di alamat No. 2 Jalan Harmoni 11/3, Taman Harmoni, di dalam Daerah Kajang, di dalam Negeri Selangor Darul Ehsan, telah melakukan samun berkawan dan bersenjata ke atas Hisham Bin Zakaria, No. KP: 680106-10-5727 dengan menggunakan sebilah pisau, dan mengambil barang kepunyaannya iaitu (1) Unit Komputer Riba jenama HP, (3) unit telefon Bimbit Blackberry dan Nokia, dan wang tunai berjumlah lebih kurang RM1,100. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 395/397 Kanun Keseksaan.

[2] They pleaded guilty to the charge and were sentenced to seven years imprisonment and seven strokes of the rotan each. The offence carries an imprisonment term of up to 20 years upon

A conviction and the offender is also liable to whipping. They were dissatisfied with the sentence and appealed for the sentence to be reduced, on the following grounds:

(a) they pleaded guilty to the charge.

B

(b) they are remorseful and promise not to commit the same offence in future.

[3] However at the commencement of the hearing they applied to withdraw the appeal. In passing sentence the learned Sessions C Court Judge rightly considered public interest as the paramount consideration, citing *R v. Ball* [1951] 35 Cr App R 164; *PP v. Loo Choon Fatt* [1976] 1 LNS 102, [1976] 2 MLJ 25; *PP v. Teh Ah Cheng* [1976] 1 LNS 116; *Teo Siew Peng & Ors v. PP* [1984] 1 LNS 71; *PP v. Nazarudin Ahmad & Ors* [1993] 2 CLJ 543. He D also rightly said that it would be wrong to be lenient with the appellants. In *Mohamed Jusoh Abdullah And Another v. PP* [1947] 1 LNS 66; [1947] 13 MLJ 130 the Malayan Court of Appeal laid down the rule that in passing sentence the guideline should include the following:

E

(i) consideration on the nature of the offence;

(ii) the circumstances under which the offence was committed;

(iii) the degree of deliberation shown by the offender;

F

(iv) the provocation, if any received by the accused;

(v) the degree of violence involved; and

(vi) the antecedents, age and character of the accused.

G

[4] It is therefore incumbent on the sentencing court to direct its mind properly and adequately to the proved or admitted facts of the case. It is through the facts that the full circumstances of the crime are known. Failure to do so will render the sentence H defective. In laying out the facts of the present case this is what the learned Sessions Court Judge noted:

> Pada 27/7/12 jam lebih kurang 0405 HRS, semasa bertugas di pejabat pertanyaan, telah terima telefon daripada pengadu nama En Hisham, no telefon: 03-87246591 telah kena samun oleh (4) I Bangsa Indonesia di alamat No 2, Jln 11/3 Taman Harmoni,

Bandar Teknologi. Pengadu jadikan report sebagai maklumat pertama. Tangkapan terhadap di (sic) telah dibuat pada 27/7/12 jam lebih kurang 0830 HRS di sebuah rumah kongsi, Kilang Papan Sia Thean Sung, Lot 1054/1, Jln Bangi Bt 1 1/2 Semenyih, Kajang. Tangkapan terhadap B2 telah dibuat pada 27/7/12 jam lebih kurang 1620 HRS di sebuah rumah kongsi, kilang Papan Sia Thean Sung, Lot 1054/1, Jln Bangi Bt 1 1/2 Semenyih, Kajang. Siasatan yang dijalankan mendapati bidan (sic) B2 terlibat dalam kes ini. Dalam kawad cam yang dijalankan A1 dapat cam akan bidan (sic) B2 berdasarkan saiz badan, tinggi dan rambut. Selain itu A1 juga mengecamkan barang rampasan yang dibuat terhadap B1 iaitu (1) H/P Blackberry, (1) pisau jenama "think kitchen" dan (1) jam tangan coleman sebagai milik A1.

[5] The 'facts' as outlined by the learned Sessions Court Judge above contains precious little as to the circumstances under which the offence was committed. Significantly it omits to show how the crime was committed and how the appellants and their accomplices conducted themselves at the time of committing the offence. These are important considerations in passing sentence. The learned judge should have properly and adequately directed his mind to the victim's police report which was produced and marked as exh. P3. The police report shows that although the appellants were charged with the crime of armed gang robbery they had in carrying out the robbery broken into the victim's house, which is an offence by itself punishable under s. 453 of the Penal Code. This fact distinguishes the offence from ordinary robberies committed outside the confines of people's homes.

[6] What the victim went through can be seen from his police report. This is what he revealed. On 27 July 2012 at about 3am while he was sleeping with his wife, he was awoken by a very loud bang on the door to his bedroom. Apparently the robbers had smashed open the door from the outside with something heavy. As the victim was trying to get up from his bed after the rude awakening he was confronted by three male intruders suspected to be Indonesians. One of them pointed a knife at his neck and warned him, his wife and his daughter not to make any noise if they did not want to be harmed. The intruders then tied them up with wire used for hanging clothes (dawai) before ransacking the house. They left about 15 minutes later but not before having themselves to a laptop, three handphones and about RM1,100 in cash.

[7] It is not hard to imagine the fear, the terror and the sense of helplessness the victim and his family members were subjected to by these criminals. We read and hear this kind of criminal activity almost daily in the electronic and print media. The time to say enough is enough is in fact long over. Ironically the court is often urged to temper justice with mercy. Not in my view to knife wielding robbers who break into other people's homes, tie their victims up and threaten them with harm. What is so frightening is that these criminals will not hesitate to injure or even kill their victims at the slightest of resistance. The possibility of being physically harmed is ever present when these criminals strike. There have been cases where they raped their victims in front of their family members. For this reason they deserve no sympathy from the court. The court's sympathy should be with the victims who had to endure terrifying moments before the ordeal was over.

[8] As a general rule a plea of guilty is a mitigating factor. But in cases of armed gang robbery by breaking into other people's homes I am of the view that a plea of guilty should not be given too much consideration. The same goes with having no record of previous conviction. The rampancy of the offence, the trauma caused to the victims and the negative impact this type of criminal activity has on society demands that the punishment must be stiff enough to deter others from committing the same offence. In *PP v. Shahrul Azuwan Adanan & Anor* [2013] 2 CLJ 686 I had occasion to deal with the matter of sentencing and said this:

> A sentence to be of any use must have the effect of deterring not only the offender from repeating the same offence but also others from following his footsteps. The sentence must commensurate with the seriousness of the offence and must reflect the degree of public disapproval for that particular type of criminal behavior. The more repulsive the criminal behavior the more severe the sentence should be. The measure of public disapproval is how the reasonable men and women on the street would react to the criminal conduct that the offender is guilty of.

[9] In *Sau Soo Kim v. PP* [1975] 1 LNS 158 Lee Hun Hoe CJ (Borneo) in dealing with a plea of guilty said in his judgment (read out by Suffian FCJ as he then was):

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

[10] This observation by the learned CJ (Borneo) must however be understood in its proper context. First of all court proceedings are now computerised throughout the country. With the exception of a few, trials are now not as lengthy as they used to be. In that case the appellant was found guilty after full trial of three charges, one under the Penal Code and two under the Arms Act, 1960 and was sentenced by the High Court to ten years imprisonment for the first charge and four years imprisonment for the second and third charges respectively. The sentences were ordered to run consecutively which means the appellant was to serve a total of 18 years in prison.

[11] On appeal, the Supreme Court set aside the order of consecutive sentence and ordered it to run concurrently, which means the appellant had to serve only ten years imprisonment instead of 18 years. The principle that I can gather from the decision is that if the offender pleads guilty to more than one charge and the sentences are ordered to run consecutively the sum total of the sentences must not be excessive. Perhaps the context is best explained by His Lordship's statement, as follows:

> While I cannot say that the sentence on each charge is excessive or unreasonable, I do feel that the totality of 18 years is rather severe in the circumstances.

[12] The crime of armed gang robbery by house breaking almost always involves striking fear in the minds of the victims. That after all is part of the plan. In the present case a knife was pointed at the victim's neck to threaten him into submission. The appellants are aliens and the arrest report shows that when they were cornered by the police at their 'kongsi' in the early hours of 28 July 2012, the day after the robbery, they tried to run away and had a scuffle with the police. It is obvious that they had no desire to take responsibility for what they had done. Had it not been for the efficiency and quick action of the police they would have escaped punishment altogether and lived another day to break into another family's house of their choice. As a matter of fact their two accomplices are still at large to this day.

[13] In *PP v. Lee Tak Keong* [1988] 1 LNS 217 the facts are these. On 1 November 1986, at about 8.30pm the victim was at the pasar malam in Jinjang together with a friend. While they were there, they were surrounded by the respondent and four other

male persons. The five male persons ordered them to go to a nearby field. In the middle of the field the victim and his friend were asked to squat down. The respondent took $47 cash and an identity card from the victim's wallet. Then the respondent and his friends left. The respondent who was 20 years old at the material time was charged with gang robbery under s. 395 read with s. 34 of the Penal Code. No weapon was used in the commission of the offence and the victim was not threatened with harm. The respondent was also a citizen and a first time offender.

[14] On those facts and after taking into account the plea in mitigation the learned Magistrate sentenced the respondent to two years imprisonment and ordered him to pay compensation in the sum of RM50. Whipping was not imposed. On appeal by the Public Prosecutor against inadequacy of sentence, Zakaria Yatim J (as he then was) enhanced the sentence to five years imprisonment and six strokes of the rotan. The compensation order was also affirmed. In his judgment the learned judge made the following observations:

> The offence of robbery is rampant today and in most cases dangerous weapons are used. In some cases the victims of the robberies sustain injuries: see *Goh Chong Wee v. PP* Federal Territory Criminal Application No CR 52-60-1987 (refd) and *PP v Mustanina bin Daing Sinring and Anor* Criminal Application No 51-125 of 1987 (unreported) (refd). In cases of robbery the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime. The court is aware that in the present case no dangerous weapons were used and the complainant and his friend were not injured. But the court must not overlook the fact that there were five of them who surrounded the complainant and his friend and committed the robbery. If the court does not impose a deterrent sentence the respondent and his four other friends may commit similar offences and they may even use dangerous weapons and inflict injuries on their victims.

[15] The facts in the present case are far more repulsive than the facts in *Lee Tak Keong (supra)*. Therefore it makes no difference that the respondent in that case claimed trial to the charge unlike the appellants who pleaded guilty. The appellants were 27 and 22

years old respectively at the time they committed the offence and there were four of them. They broke into the victim's house in the dead of night while the victim and his family were asleep, smashed open the bedroom door, pointed a knife at the victim's neck and then tied the family up with wire before robbing them of their belongings. What can possibly mitigate this criminal behaviour? None I would say.

[16] The public must be protected from these dangerous individuals. One way is for the courts to pass sufficiently deterrent sentences so as to strike fear in the minds of those who harbour thoughts of committing the same offence. The deterrent factor must weigh heavily in the minds of the sentencing courts. The courts must send a strong message to those who contemplate committing the same offence that very severe sentences await them if they are caught and brought to justice. Unless there are extenuating circumstances the sentence of whipping must be imposed in addition to the sentence of imprisonment. If they are brave enough to break into other people's homes and threatening their victims with dangerous weapons they must be brave enough to suffer the excruciating pain of whipping. I am made to understand by the prison authorities that it is whipping, not imprisonment that offenders fear most. Whipping is therefore an effective deterrent. And if the sentence of whipping is to be imposed the number of strokes must be sufficient to deter those who think they can profit from traumatising other people in the safety of their homes.

[17] In my view the sentence in the present case is not deterrent enough and does not sufficiently reflect the degree of public abhorrence for this type of criminal behaviour. The offence is rampant, it is traumatising to the victims and is compounded in the present case by the fact that the perpetrators are aliens. They should be law abiding and earn their living honestly instead of breaking into other people's homes and robbing them of their belongings. I have at the hearing of the appeal given the appellants the opportunity to submit on why the sentence ought not to be enhanced. Both merely said that the sentence is adequate and that they are remorseful after thinking the matter over while serving jail sentence for the past two months. For reasons I have adumbrated earlier I am not persuaded that the sentence ought not to be enhanced. In the circumstances and in

A exercise of my powers of revision under s. 325 read with s. 316(b)(ii) of the Criminal Procedure Code, I order that the sentence against both appellants be enhanced to ten years imprisonment and ten strokes of the rotan. Their appeal against sentence is struck out.

B

C

D

E

F

G

H

I